That figure has not been seriously attacked, and I have no hesitation in accepting it as at the end of April, 1951, beyond which date no claim has been made.

Judgment will accordingly be entered as follows: There will be judgment for the plaintiff against the defendant personally for $1,250 on the claim. There will be judgment against the plaintiff in favour of the defendant as administrator for $1 damages for trespass and $1,601.80 being the profits on the counterclaim. As regards costs the plaintiff will have the costs of the claim and the defendant as administrator the costs of the counterclaim. I make no order as to set off.

Order accordingly.

LIM KIM CHOY v. WONG CHOW.

[Orig. Civ. Juris. (Thomson, J.) January 17, 1952]

[Ipoh — Civil Suit No. 420 of 1951]

Mining Lease — Mining Enactment, s. 26 and Schedule X — Land Code, s. 96 — "Mining Operation" — Meaning of.

The defendant granted a lease in statutory form of mining land to the plaintiff and on the same day a "supplemental agreement" was made whereby provision was made for the renewal at the end of a year of the lease "yearly for a further period of four years" upon certain conditions. Neither documents was registered but the lease was recorded in the Mines Office. At the expiration of the lease the defendant refused renewal alleging a breach of conditions on the part of the plaintiff and want of consideration for the "supplemental agreement."

Held, that the lease and the "supplemental agreement" were to be read together and the consideration for the "supplemental agreement" was the consideration in the lease. Although for want of registration the "supplemental agreement" created no interests in the land nevertheless it conferred contractual rights.

Held further, that on the construction of what amounted to "mining operations" the plaintiff had not committed a breach of the conditions.

Cases referred to:—

(1) *Ramasamy Chetty v. Fan Seng Yew* 1 F.M.S.L.R. 354.

(2) *Haji Abdul Rahman v. Mahomed Hassan* (1917) A.C. 209.

(3) *Gumm v. Tyrie* (1864) 4 B. & S. 680 at 713.

CIVIL SUIT.

K. C. Chan for the plaintiff.

J. R. Devadas for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Thomson, J.: — This action arises out of certain transactions relating to Mining Lease 12560 in respect of Lot No. 34009, Mukim of Ulu Kinta, the holder of which at all material times was the defendant. For some time prior to 21st November, 1949, the lease was subleased to a partnership known as the Hup Lee Kongsi. Their sub-lease, however, came to an end on 21st November, 1949, the defendant granted a fresh sub-lease for a period of one year to the plaintiff. That sub-lease was in the statutory form as set out in Schedule X to the Mining Enactment and being for a period not exceeding one year did not require registration although it was recorded at the Mines Office in due course as Ipoh West Haptong No. 61 of 49. The consideration was expressed to be the sum of $1 and the obligation to pay tribute, and tribute was fixed at the rate of 10 per cent.

On the same day the parties executed an agreement "intended to be supplemental" to the sub-lease. It stated that the parties had "agreed to renew the said sub-lease on its expiry yearly for a further period of four years" upon certain conditions and then set out the substance of the agreement, the relevant portions of which are as follows:—

"1. The Sublessor agrees to renew the said Sublease on its expiry yearly for a further period of four years, on the same terms and conditions; provided always that the Sublessee has carried out the stipulations in the said Sublease to the satisfaction of the Sublessor.

2. If, at any time during the continuance of the said Sublease or any renewal thereof the Sublessee shall cease mining operations on the said land continuously for a period of six months the Sublessor shall have the right to refuse to grant any further renewal thereof.

3. .....

4. The Sublease shall be read and construed and be enforceable as if the terms of this Agreement were incorporated therein.

5. ....."

The question of the validity of this second agreement will have to be considered at a later stage. I would only observe at this stage that it was neither registered nor recorded at the Mines Office.

Yet again, either on 21st November, 1949, or 21st December, 1949 (there is controversy as to the date but the point is not material) a hire purchase agreement was executed under which the lessor hired out to the lessee a quantity of mining equipment including a Diesel engine.

These arrangements being made, the plaintiff entered on the land and commenced mining operations. The nature and the extent of these operations from the major subject of controversy in the case and will shortly call for detailed consideration. It is sufficient to say at this stage that about the middle of December the engine which the plaintiff had hired from the defendant broke down. All attempts to repair it by the sub-lessee apparently failed, and some months later

it was returned to its owner and another engine in its place was not installed until the beginning of August.

I pause at this stage to observe that in my opinion, in spite of the attention that was devoted to the subject at the trial, any questions relating to this engine are irrelevant to the issues in the present proceedings. If there was any warranty as to the condition of that engine, if any such warranty has been broken and if the plaintiff has thereby suffered damage are questions which if they are to be raised at all must form the subject matter of separate proceedings.

To return to the land, the plaintiff while still, according to his own story, engaged in the search for a new engine had on 2nd June, 1950, entered into an agreement with one Pang Keat Boon who was a partner with his father Pang Swee Lim in the Fang Lee Kongsi. That agreement which was neither registered nor recorded at the Mines Office referred to the sub-lease by the defendant to the plaintiff and to the so-called supplemental agreement of 21st November, 1949, and recited that Pang Keat Boon had requested the plaintiff and the plaintiff had agreed to allow him to work the land for tin ore, it acknowledged the receipt by the plaintiff of $2,000 which was to be treated as an advance of tribute; and it provided that Pang Keat Boon was to work the land and was to pay tribute to the plaintiff at the rate of 20 per cent. The agreement was expressed to be in force for a period of one year and to be renewable yearly for a further period of two years on the same terms and conditions and for an indefinite period beyond the first three years upon such conditions as might be agreed between the parties to it.

It is not, I think, necessary for the purposes of the present proceedings for me to consider at length the nature and full legal effect of this agreement of 2nd June. It conferred on Pang Keat Boon no exclusive right to possession of the land or even to the mining rights ever it, and it certainly did not confer upon him all the rights conferred on the plaintiff by the sub-lease of 21st November. In truth it amounted to nothing more than an arrangement for the working of the land by the Kongsi of which Pang Keat Boon was a member and in that connection it is significant that when it became necessary to obtain the approval of the Mines Department for a new scheme of mining, the proposed scheme was put forward by Pang Swee Lim not as manager of the Fang Lee Kongsi but as manager for the plaintiff.

A few weeks later, either as a result of the infusion of fresh human blood or of fresh financial blood or as a result of good fortune on the part of the plaintiff in finding a suitable engine, production of ore on the mine was resumed and continued throughout the period with which I am concerned here. Tribute was regularly paid by the Fang Lee Kongsi to the plaintiff at the rate of 20 per cent. and by the plaintiff to the defendant at the rate of 10 per cent. and of course the amount of these payments was substantially affected by the great rise in the price of tin which it is common knowledge took place in 1950.

In this connection I would observe that I am satisfied on the evidence that having regard to the whole of the financial transactions between the parties and to their conduct there was no irregularity as to the payment of tribute which could be said to constitute a breach of the terms of the sub-lease which was not at the very lowest acquiesced in by the defendant.

Matters continued on the basis of the Fang Lee Kongsi working the land as manager for the plaintiff and paying the plaintiff 20 per cent. tribute out of which he paid the stipulated 10 per cent. to the defendant until the expiry of the sub-lease on 20th November, 1950. The defendant then refused to renew the sub-lease and granted another sub-lease for a year direct to the Fang Lee Kongsi at a rate of tribute of 16 per cent. and in consequence of his sub-lease having terminated and not being renewed, the Mines Department withdrew the plaintiff's hydraulic mining licence in respect of the land.

It is the plaintiff's case that he was entitled to a renewal of the sub-lease, and it is the defendant's case that by reason of the plaintiff's conduct he was not entitled to claim renewal. To decide the question which thus arises calls not only for a detailed examination of the plaintiff's conduct but also for a detailed examination of the arrangement between them which is contained in the sub-lease and the so-called supplemental agreement of 21st November, 1949. These two instruments, in my opinion, can only be regarded as together constituting a single agreement containing the whole substance of what was agreed upon between the parties. In the words of the defendant himself, "the agreement was in writing and consisted of the sub-lease and supplemental agreement". They were both made on the same day, they were both stamped on the same day which was the day following their making and by the express terms of the supplemental agreement they were to be read together.

At this stage, however, it will be convenient to deal with the preliminary point which was taken by counsel for the defendant that the supplemental agreement was void because admittedly it had never been

registered or alternatively was bad for want of consideration. It is, of course, clear that that agreement could not be valid so as to create any interest in the land unless and until it was registered (see the Land Code, section 96, and the Mining Enactment, section 26) and that this bar to its validity would extend to the creation of equitable interests (see *S. A. S. P. K. Ramasamy Chetty v. Fan Seng Yew*[1]). To say, however, that lack of registration renders the instrument void as a contract is an entirely different proposition and one which to my mind is not well-founded. The point was considered by the Privy Council in the case of *Haji Abdul Rahman v. Mahomed Hassan*[2], where their Lordships were concerned *inter alia* with the interpretation of section 4 of the (Selangor) Registration of Titles Regulation, 1891, the terms of which were similar in nature to but very much more sweeping than those of section 26 of the present Mining Enactment, and in the course of their judgment (per Lord Dunedin) the following observations occurred :—

"The agreement under discussion.....could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant. But when that is said section 4 has no further application. It does not profess to prohibit and strike at contracts in reference to land, provided that such contracts cannot be construed as attempting to transfer, transmit, mortgage, charge, or otherwise deal with the land itself. In other words, it is contracts or conveyances which, but for the section, might be held to create real rights in a party to the contract or conveyance which alone are struck at."

As regards the question of consideration, if it be held, as I have held, that the sub-lease and the supplemental agreement are to be regarded as one single agreement the point is without substance.

Turning now to the actual terms of the arrangement between the parties, I do not propose to set out at length the terms of the sub-lease which, as I have already said, is in the statutory form contained in Schedule X to the Mining Enactment. After recitals, it purports to sub-lease the land for a period of one year "subject to the provisions of the Mining Enactment, and to the following conditions, restrictions and exceptions" of which those relevant to the present proceedings are as follows :—

"1. That the sub-lessee shall pay to the sub-lessor, or to his duly appointed agent, tribute upon all ore removed from the said land at the rate of ten percent (10%).

2. That the said tribute shall be paid immediately on each and every sale of ore of which sales, the sub-lessor shall have full notice and the right to be present and to buy such ore at the price at which it is being offered for sale.

3. That the sub-lessee shall be liable upon suit before the Senior Inspector or any Court to pay to the sub-lessor the sum of $100/- as a penalty for each and every breach of the conditions above set out which he may commit.

4. .....

5. .....

6. .....

7. That the sub-lessee shall not be entitled to transfer or assign this sub-lease without the written authority of the sub-lessor.

8. That this sub-lease shall be liable to cancellation at any time at the discretion of the Senior Inspector or the Court upon proof:

(i) That the sub-lessee has failed to pay to the sub-lessor the amount of any moneys which he is by the terms of this sub-lease bound to pay for a period of six months from the date at which such payment became due.

(ii) That the sub-lessee has not worked the land in accordance with clause 4 of this sub-lease or has by his default rendered the land liable to forfeiture under the Mining Enactment.

(iii) That the sub-lessee has not during a period of six months employed at least 71 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than one month in mining the land.

(iv) That the sub-lessee has committed a breach of clause 7 of this sub-lease.

9(a). .....

10. ....."

The relevant portions of the supplemental agreement have already been quoted.

In my opinion the two documents together amount to this. There is a sub-lease of the land for a period of one year coupled with an agreement to renew that sub-lease "yearly for a further period of four years", which can only mean it is to be renewed for periods of one year at a time for a period of four years. That right of renewal is subject to the fulfilment by the sub-lessee of certain conditions. The first of these is that the sub-lessee shall have carried out the "stipulations" in the sub-lease, for now that the question of interpretation has become one for the Court the words "to the satisfaction of the sub-lessor" can be put aside and disregarded. The second is the condition relating to the cessation of mining operations for a period of six months and that condition presents a difficulty not only as to its own interpretation but also as to the interpretation of the first condition. That second difficulty arises in the conflict between the condition in question and paragraph 8(iii) of the sub-lease itself. The terms of both instruments have already been quoted and the conflict may be put thus. While a single day's work by a single labourer within a period of six months would deprive the lessor of his right to refuse to renew under the supplemental agreement it would not be sufficient to protect the lessee against cancellation of the sub-lease itself under paragraph 8(iii) which in effect renders the sub-lease liable to cancellation on proof that the sub-lessee has

not employed at least 71 labourers or their equivalent in mechanical power for a minimum period of a month in any period of six months. In other words, if both provisions are to stand it means that in certain circumstances the sub-lessee could insist upon renewal and at the same time the sub-lessor would be entitled to cancellation which on the face of it is absurd. To my mind the only possible solution of the difficulty is that the parties intended that the provisions of the supplemental agreement should override the corresponding provisions of the sub-lease or at the very lowest that they intended that a failure to comply with paragraph 8(iii) of the sub-lease should not be regarded as a failure to comply with the stipulations of the sub-lease for the purposes of the first condition contained in the supplemental agreement unless it amounted to a failure to comply with the second condition in that supplemental agreement. So to hold is not only to solve a difficulty that would otherwise be wholly intractable; it is also to provide a solution that is really more reasonable than might at first sight appear. After all, it is to be borne in mind that most of paragraph 8(iii) of the sub-lease, and indeed the greater part of that instrument, is in the common form taken from the Schedule to the Mining Enactment whereas the supplemental agreement is the handiwork of the parties themselves, and as was said by Blackburn, J. in the case of *Gumm v. Tyrie*[3] :—

"Where there are formal and general words which are the usual terms of a contract, and there are other special and peculiar words, and the question is, which are to have most weight, the terms which a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight."

I am not overlooking the fact that the figures '71' were inserted in paragraph 8(iii) by the parties themselves but I am unable to attach very great importance to that in view of the fact that when the sub-lease was executed there was on the mine the mechanical equivalent alone of over 800 labourers.

Having thus dealt with paragraph 8(iii) of the sub-lease and having previously dealt, so far as I considered necessary, with the questions of payment of tribute and assignment, I have no hesitation in holding that up to the termination of the sub-lease on 20th November, 1950, the plaintiff had carried out the stipulations contained in it.

There remains to be considered the question of whether or not the plaintiff ceased mining operations on the land continuously for a period of six months. That question, as I have said, has formed the major subject of controversy in the case. That controversy, however, does not relate to the actual material events. As to these, the evidence of the plaintiff himself has not been contradicted, and I see no reason why I should not acccept it. The material facts briefly are as follows: The operation of the mine proceeded in the normal way until 12th December, 1949. On that date the engine which the plaintiff had hired from the defendant broke down and the mine rapidly became flooded and incapable of operation, the flooding being completed not later than 17th December which was the date the plaintiff reported the occurrence to the Mines Department. Thereafter, no further interference took place with the earth's substance *in situ* but the tin ore still adhering to the surface of the palong was removed. There is no evidence as to the date on which this was completed, which must, however, have been sometime prior to 23rd January, 1950, which is the date of the last sale of tin ore for several months. I am not concerned with the plaintiff's subsequent efforts to repair the engine and, at a later stage when the defendant had taken possession of it for non-payment of the hire, to obtain another engine, nor am I prepared to accept his evidence which was vague and in conflict with that of Pang Swee Lim that he did some prospecting work on the land prior to 2nd June. On that date, however, he entered into the agreement which has already been mentioned with the Fang Lee Kongsi of which Pang Swee Lim was a partner, and I am satisfied that immediately thereafter and throughout the month of June a number of bore holes were put down on the land with a view to ascertaining the best method of approaching the tin ore. Shortly afterwards another suitable engine was obtained and normal production of tin ore was resumed about the middle of August.

Can it be said on that evidence that the plaintiff had ceased mining operations on the land continuously for a period of six months? That involves a consideration of what is meant by "mining operations", in that connection I have no hesitation in accepting the definition of "mining" contained in section 3 of the Mining Enactment which reads as follows :—

" "Mining" or "to mine" means to disturb, remove, cart, carry, wash, sift, melt, refine, crush or otherwise deal with any rock, stone, gravel, clay, sand, soil or mineral by any mode or method whatever for the purpose of obtaining metal or mineral therefrom;"

and it seems to me that "mining operations" must include every and any physical act which is designed to produce the effect of mining. Applying that principle to the facts before me, I find little difficulty in arriving at the following results. There is no question of any cessation of mining operations prior to the breakdown of the engine on 12th December. As regards the scraping of the palong, I think it is

common knowledge that that is an ordinary step in the usual and accepted Chinese method of hydraulic mining, and it clearly comes within the scope of removing and washing the mineral for it seems to me highly unreasonable to say that either of these processes has been completed so long as the resultant product remains suspended in and adhering to a portion of the structure designed to assist in its removal and washing. Again I am of the opinion that in the circumstances of the present case the sinking of bore holes amounted to a mining operation. I do not say for one moment that every and any form of speculative prospecting for mineral could be so regarded. Here, however, there was a limited area of land which was known to contain tin ore and to sink a number of bore holes with a view to ascertaining the best method of working that ore can only be regarded as a necessary step in the working of it particularly where it leads as in fact it did here to immediately following active production.

The scraping of the palong took place some time subsequent to 12th December and the boring commenced immediately after 2nd June and so although as the great Duke of Wellington is said to have said of the Battle of Waterloo: "It was a damned close run thing", nevertheless the two events are within a period of six months of each other, and I must therefore hold that the plaintiff was entitled to renewal of his sub-lease.

Having arrived at that result, there remains the question of the remedy to which the plaintiff is entitled, and that question presents little difficulty when it is remembered that what the plaintiff became entitled to on 21st November, 1950, was not a renewal of his sub-lease for a period of four years but a renewal of it for one year only. It may well be that on 21st November, 1951, he became entitled to a further renewal for a further period of one year, and it may well be that he has not in fact obtained that further renewal. I do not, however, think it is open to me to consider and adjudicate upon his rights in that connection in the present proceedings which were instituted on 28th May, 1951, before there could have been any question of a refusal to grant a second annual renewal. Whether that question ever comes before the Court will, I imagine, depend upon a combination of the litigious-mindedness of the parties and the price of tin.

As regards the defendant's failure to renew for the year commencing 21st November, 1950, there can, of course, be no question of specific performance because to perform would be impossible. There will, therefore, be judgment for the plaintiff for damages to be assessed on inquiry by the Registrar. The measure of damages will be the net profit of the time to the defendant during the year in question subject to the deduction of the tribute which would have been payable to him by the plaintiff under the sub-lease. The plaintiff will also have the taxed costs.

Order accordingly.